Supreme Court, U.S.
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No. 01-45

In the Supreme Court of the United States

GARY MAZZA,

Petitioner,

v.

WILLIAM BRATTON, as Commissioner of the New York City Police Department, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can paid or unpaid leave constitute a reasonable accommodation under the Americans with Disabilities Act?

2. Is regular and predictable attendance a job requirement under an Americans with Disabilities Act analysis?

3. Must an employee request that he/she be reasonably accommodated in order to invoke the reasonable accommodation provisions of the Americans with Disabilities Act?

LIST OF PARTIES

Petitioner

The petitioner, Gary Mazza, has no corporate affiliations.

Respondents

The respondents are: William Bratton, as Commissioner of the New York City Police Department; Raymond P. Kelly, as Commissioner of the New Your City Police Department; Lee P. Brown, as Commissioner of the New York City Police Department; The New York City Police Department and The Police Pension Fund Article II of The New York City Police Department.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Eastern District of New York is published at 108 F. Supp. 2d 167 (E.D.N.Y. 2000). It is reproduced in the Appendix. The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was rendered on April 11, 2001. No rehearing was requested.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is the American with Disabilities Act (ADA), 42 U.S.C. §12101, et seq.. For purposes of this petition, the relevant portions of the ADA provide:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees,

employee compensation, job training, and other terms, conditions and privileges of employment. 42 U.S.C. §12112(a).

A "disability" includes, in relevant part, a physical or mental impairment that substantially limits one of more of the major life activities of such individual .... 42 U.S.C. §12102(2)

"Discrimination" includes, not making reasonable accommodations to the known physical or mental limitations of any otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. 42 U.S.C. §12112(b)(5)(A)

The ADA defines "Qualified Individual" and "Reasonable Accommodation" as follows:

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description

before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and usable by individual with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment of devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. §12111

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner, Gary Mazza, was terminated as a probationary Police Officer with the New York City Police Department (NYCPD) on February 25, 1993 because he was disabled. Petitioner had been appointed as a Police Officer in the NYCPD on or about October 15, 1990.

As part of his application process, petitioner underwent extensive medical examinations. At no time prior

to his appointment was petitioner found to have any medical condition affecting his colon or gastrointestinal system.

On or about April 24, 1992, petitioner returned to duty after a two week regularly scheduled annual leave and immediately upon returning to duty began suffering diarrhea and blood in his stool.

On May 2, 1992, petitioner collapsed on his way to work and was rushed to St. Vincent's Medical Center in Staten Island, New York. Petitioner was diagnosed with universal ulcerative colitis, an inflammatory condition affecting his gastrointestinal tract. Universal ulcerative colitis is a physical disorder of the digestive tract, which is symptomatic in varying degrees twenty-four hours a day, seven days a week. As a result of this condition, petitioner was hospitalized four times at St. Vincent's Medical Center between May 2, 1992 and June 14, 1992. Petitioner's physicians did not consider this to be a minor ailment.

The Discharge Summary dated May 6, 1992, after petitioner's first hospitalization, noted that petitioner had a history of "approximately four weeks of diarrhea, bloody in the previous three weeks." It also noted that petitioner had been "dehydrated, weak and dizzy." The Discharge Diagnosis was "Hemorrhagic colitis."

The Discharge Summary dated May 24, 1992 noted that petitioner

> "continued to experience numerous bloody bowel movements averaging about 8 per day and having approximately 8 on the day of admission. He was dehydrated and quite symptomatic despite use of Dipentum and

Prednisone at home."

The Discharge Diagnosis was "1. Ulcerative colitis. 2. Pseudomembranous colitis." The Discharge Summary of June 11, 1992 reaffirmed petitioner's diagnosis.

Ulcerative colitis is a form of inflammation affecting the gastrointestinal tract. The degree of inflammation can vary from mild to severe. The degrees of inflammation can be classified in four degrees -- (1) mild inflammation, (2) moderate inflammation, (3) moderate-severe inflammation and (4) severe inflammation. Petitioner was diagnosed as suffering from the most severe form of ulcerative colitis. In fact, he was classified as suffering from extensive or "universal" ulcerative colitis.

Universal ulcerative colitis is most commonly accompanied by symptoms of inflammation causing a large volume of mucus, pus and blood in the stool. It is also accompanied by symptoms of diarrhea, bowel urgency, rectal discomfort, abdominal cramps, anemia, malnutrition, severe weakness, fever and pain.

In or about May, 1992, petitioner began suffering many of these symptoms and more, including severe diarrhea, bloody and loose stool, inflammation, severe cramps, nausea, loss of appetite, loss of weight, gas, severe pain in different degrees, dehydration, fever, sleep deprivation, fatigue, mood changes, sexual disfunction, severe joint pain and anemia, due to loss of blood. Petitioner also had to undergo repeated exams, including CAT scans, X-rays, colonoscopies, endoscopies and barium enemas. Petitioner began experiencing fissures, hemorrhoids and cracks to his rectal area. These were very painful.

As a result of the universal ulcerative colitis and its resultant symptoms, petitioner had difficulty cooking, cleaning, shopping, showering, engaging in personal hygiene, sitting up in bed, washing clothes and changing clothes. Petitioner was compelled to consume a special diet, use a portable commode and could not engage in social activities. At times, petitioner was bedridden. With varying degrees, petitioner would also have to utilize a bathroom up to ten times per day.

All symptoms can usually be treated with medication and dietary control. Surgery, in a small proportion of patients, may be necessary. As a result of the universal ulcerative colitis, petitioner has taken and continues to take numerous medications. He will be on medication for the rest of his life. He will also be compelled to consume a special diet for the rest of his life.

Because of the medication and special diet, as time advanced in 1992 and into 1993, the symptoms of petitioner's condition began to stabilize and improve. The bowel movements and cramping decreased. The frequency of severe episodes decreased. Petitioner continually got better. However, petitioner continued to be affected in his normal functions and activities. On some days, petitioner was more lackadaisical and his ability to engage in certain activities, such as driving and shopping, were impaired. At times, petitioner continued to soil himself while engaging in daily activities such a driving and walking. Petitioner even continued to wear diapers at times. His condition, although symptomatic twenty-four hours per day, was being eased with medication, diet and medical observation. By February, 1993, although not in remission, petitioner's condition had improved to the point where he was able to work.

Prior to February, 1993, petitioner requested that respondents return him to duty, with reasonable accommodation. Petitioner wanted to be assured that he would be in close proximity to a bathroom.

In his affidavit to the Equal Employment Opportunity Commission (EEOC), petitioner stated

> "In October, 1992, I requested Dr. Edelman for an accommodation because I felt I was qualified to work. I was not allowed to report to active duty because I was on medication. My father also asked Dr. Leah Dann in 12/92 to recommend my being put back to active duty with accommodation. She also stated that I could not be put back to work because I was on medication."

In support of his anticipated return to duty, on or about January 6, 1993, petitioner submitted a note from his treating physician, Dr. Prasanna Wickremesinghe. In this note, Dr. Wickremesinghe stated

> "This patient is still under intensive medical therapy for chronic universal ulcerative colitis. Should he respond favorable, he will be able to resume his previous duties with some accommodations."

This note by Dr. Wickremesinghe was intended to mean that petitioner was responding favorably and that he could then return to duty with some accommodation.

Petitioner has been examined by several noted gastroenterologists, all of whom state that having ulcerative

colitis does not automatically exclude an individual from the police force. All of them stated that they have patients who are active New York City Police Officers who suffer from bowel diseases, some of whom have had ileostomy apparatus attached to their bodies after having their colon removed. Most patients with ulcerative colitis are capable of full time employment; and that the most common accommodations usually required are reasonable access to lavatory facilities and occasional time off for flare ups. The accommodation needed will differ, depending upon the diagnosis.

Meanwhile, petitioner was required to make weekly trips into respondents' Special Medical District in Lefrak City, Queens, New York, where he was examined by a Department Surgeon.

During his visits to the Department Surgeon's Office, petitioner routinely tape recorded the conversations. Copies of these tape recordings were provided to respondents' counsel during discovery. These tape recordings confirm that the Department Surgeons lulled petitioner into believing that he would not be terminated and would be giving a full and fair opportunity to recover and return to work.

At all times during his visits to the Department Surgeon and up to and including February, 1993, the Department Surgeon perceived petitioner as disabled from his ordinary and most other occupations. As a result, respondents and their agents refused to permit petitioner to return to duty.

In fact, the Department Surgeons' statements to petitioner confirmed that they were in no rush to have petitioner return. On October 28, 1992, Stanley Edelman, M.D., a Department Surgeon, told petitioner, according to

one of the tapes that he made and which were turned over to respondents' counsel,

> "I would tell them to get off this job. Gary, tell them you can't get along mentally, too stressful. You've got to look out for yourself. You're going to kill yourself in this job. You're getting close to doing it, this is a serious matter. This is not a joke. ... Maybe if you get out you'll survive. Take my advice. ... You've got to get out of this environment. This is not your cup of tea."

Respondents confirmed their refusal to permit petitioner to return to work, with or without reasonable accommodation, and their perception that petitioner was disabled from his ordinary and most other occupations in their Position Paper submitted to the EEOC. Therein, respondents' representative wrote:

> "Prior to his termination, claimant had been out sick since May 2, 1992, diagnosed with active inflammatory bowel disease. During that period claimant was periodically examined by physicians from the Police Department's Health Services Division, pursuant to Civil Service Law §72.1, who determined that claimant was not medically fit to return to duty -- not even limited duty.
>
> From the period May 1992 to February 25, 1993, when claimant was terminated, there was no question of providing "reasonable accommodation" for a disability. Police Department physicians had determined that

> Mr. Mazza was medically not fit to return to duty, by reason of a biopsy-proven IBD with cramps and bloody diarrhea 6-8 times a day, and that there was no possibility of his being able to return in the near future."

Clearly, respondents refused to permit petitioner to be reasonably accommodated and rather perceived petitioner as being disabled.

After the diagnosis of universal ulcerative colitis, petitioner first visited with the Department Surgeon on June 29, 1992. The determination was then made to keep petitioner on sick leave. At that time, the Department Surgeon noted that petitioner had been treated in St. Vincent's Medical Center for a severe episode of "bleeding ulcerative colitis."

Petitioner again visited with the Department Surgeon on July 10, 1992. The Department Surgeon, again, perceived petitioner as disabled and continued him on sick leave.

Petitioner, again, visited with the Department Surgeon on July 24, 1992, August 18, 1992 and August 28, 1992. On August 28, 1992, Dr. Edelman noted that petitioner suffered from

> "a very serious debilitating case of ulcerative colitis complicated by bleeding, multiple bowel movements, weight loss, that he would eventually require major colon surgery. And at that time, I felt that his future in the police department as a full-duty Police Officer, with all the ramifications in performing full police work, was in serious doubt."

At that time, Dr. Edelman determined that he was going to seek petitioner's removal from the Police Department. On August 28, 1992, Dr. Edelman, therefore, recommended that petitioner be terminated from respondent Police Department. In doing so, Dr. Edelman clearly perceived petitioner as being unable to work. Dr. Edelman did so despite respondents' policy which permits a wait of up to eighteen months in order to determine a Police Officer's medical fitness for duty.

On August 28, 1992, Dr. Edelman believed that "In [his] professional opinion, [petitioner] was not able to work." Dr. Edelman "felt that [petitioner] was very sick. He had gone for surgical opinions. He faced the possibility of major surgery. Clinically, he was not improving. He was on multiple medications, including steroids and anti-cancer drugs.

Dr. Edelman, at his deposition, refused to state whether petitioner could have returned to work with reasonable accommodation and refused to state whether he believed that petitioner was permanently disabled. In fact, as the transcript reveals, he dodged both questions.

During his deposition, Dr. Edelman did concede that ulcerative colitis can be controlled by proper medication.

During his deposition, Dr. Edelman, finally conceded that if petitioner's condition "had been under control on the medications, he would have been capable of doing clerical work, yes."

Respondents have many full time tasks available to Police Officers which do not involve continuous patrol work and which, instead, are clearly clerical in nature. These

include, Operations Coordinator, Desk Officer, Integrity Control Officer, Planning Officer, Youth Officer, Crime Prevention Officer, Community Affairs Officer, Safety Officer, Domestic Violence Prevention Officer, Evidence/Property Control Specialist, Station House Clerk, Attendant, Switchboard Operator and performing administrative duties at Police Headquarters.

However, neither Dr. Edelman nor any other Department Surgeon ever addressed the possibility of petitioner returning to work under any circumstance. In fact, Dr. Edelman, during his deposition, stated that he had no record of and could not recall discussing with petitioner the possibility of his returning to work, with or without accommodation. In fact, Dr. Edelman stated "I don't think so" in response to a question asking him if he ever discussed "with Gary Mazza the possibility of modification of his job duties; in other words, to enable him to continue working as a Police Officer."

Dr. Edelman, in his deposition, further stated that he could not answer whether respondents could have done anything to change petitioner's job duties so as to enable petitioner to return to work.

Despite recommending that petitioner be dismissed from respondent Police Department as early as August 28, 1992, without providing petitioner with a full opportunity to medically improve, respondents never advised petitioner of such. Instead, petitioner continued reporting to the Department Surgeon as before and as his condition began improving.

In fact, during his many visits to the Office of the Department Surgeon, the last of which occurred on February

25, 1993, the Department Surgeons continuously discouraged petitioner from making any effort to return to work. They advised him that his health was more important and that he should not worry about getting back to work. On one occasion, petitioner spoke with Department Surgeon Dann. Petitioner noted

> "We spoke about my illness, and she told me to hang in there, that I seemed to be doing the right things for the problem that I have. And I had asked her about possibly being terminated from my illness, and she told me not to worry about that, that's something I wouldn't have to worry about."

The tape recordings confirm that the Department Surgeons lulled petitioner into believing that he would not be terminated and that he would be given a full and fair opportunity to recover and return to work. For example, on October 6, 1992, petitioner had a conversation with both Dr. Edelman and Dr. Dann. Drs. Edelman and Dann stated on the tape, with reference to termination,

> "No one is interested in doing that now. We are all interested in you getting better. Get it out of your mind. It's too soon. We will follow you along, if you're in the same place six months from now, we would have to look hard. Right now, it is too early to be thinking about it. Don't worry about it."

However, during this time, respondents, while assuring petitioner of his job security and although petitioner's condition was improving, continued the procedure towards his ultimate dismissal. On November 20, 1992, Dr.

Edelman, conversed with petitioner's father, Arthur Mazza. This conversation was also taped and provided to respondents. During the conversation, petitioner and his father mentioned the possibility of petitioner's returning to work. Dr. Edelman then stated "In fact, next week he is going back to work." Petitioner's father then asked "Where, doc?" Dr. Edelman then replied "We're going to try to get him into the local precinct [123rd Precinct." Unfortunately, despite petitioner having raised the possibility of his returning to work and voicing no objection to a return to his local precinct, Dr. Edelman stated that it was not up to him and that it was an administrative decision. Respondents never followed up on it.

In a memo to Dr. Dann dated December 9, 1992, Dr. Edelman instructed Dr. Dann to "write a 49 on Gary Mazza to terminate his P.D. app't."

On December 9, 1992, petitioner and his father spoke to Dr. Edelman about the possibility of petitioner returning to work. They reminded Dr. Edelman of the previous discussion about petitioner returning to his local precinct. Dr. Edelman seemed to forget the previous discussion when petitioner stated "When you discuss this with me you try to put me back to work." This tape was made available to respondents' counsel.

In a memo dated December 10, 1992 addressed to Robert E. Thomas, M.D., the Supervising Chief Surgeon, Dr. Dann recommended that petitioner "be separated from the police department." In doing so, Dr. Dann stated:

> "1. Probationary Police Officer Gary Mazza has been out sick since May 2, 1992 with active inflammatory bowel disease. He has a

biopsy proven IBD and has had cramps and bloody diarrhea (6-8 times/day) since then. He is currently on corticosteroids and 6-mercaptopurine.

2. In view of his continued disease activity, with no possibility to be restored to full duty in the near future and more than seven (7) months of being on sick report, I recommend that this Probationary Police Officer be separated from the Police Department."

By Dr. Dann's own words, she relied exclusively on the respondents' perception that petitioner was disabled and substantially limited in his ability to work as the basis of recommending petitioner's dismissal.

Dr. Dann recommended petitioner's dismissal, despite the fact that petitioner's symptoms, by December 10, 1992, were subsiding. In a letter dated February 25, 1993, petitioner was notified that his service as a Probationary Police Officer in the NYCPD was terminated. Petitioner was terminated directly because of his disability. His sick leave record was not cited as a factor. This was the first time that petitioner learned that he was to be dismissed from respondent Police Department, despite the fact that respondents first made the recommendation in August, 1992 and by their actions lulled him to believe otherwise.

Developments subsequent to his dismissal indicated that petitioner's condition did permit him to return to work, with some accommodation. These developments included a colonoscopy on March 12, 1993 and a barium enema on March 23, 1993.

B. Proceedings Below

Petitioner, inter alia, brought this action against the NYCPD and various related individuals and entities, alleging that respondents violated the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. (ADA) by terminating him from his position as a probationary Police Officer because he suffers from universal ulcerative colitis.

After discovery was completed, respondents moved for summary judgment on petitioner's ADA claim. Respondents, generally, asserted that petitioner could not establish a prima facie case with reference to his ADA claim.

Petitioner duly opposed respondents' motion. Petitioner argued that he had sufficiently met all elements to the establishment of a prima facie case under the ADA, so as to establish that genuine issues of material fact existed herein.

However, in its Opinion and Order dated August 3, 2000, the District Court granted respondents' motion for summary judgment with respect to petitioner's ADA claim. In doing so, the District Court rejected respondents' assertion that petitioner's medical condition did not rise to the level of a disability under the ADA and that petitioner was not terminated based on his medical condition. However, the District Court continued that petitioner had "failed to present sufficient evidence to create a triable factual issue that he was able to perform the essential functions of his position, with or without accommodation." The District Court further held, along these lines that petitioner had "failed to raise a genuine issue of fact concerning his ability to come to work at all." The District Court further found that "petitioner has failed to present any genuine issue of disputed fact concerning his alleged request for an accommodation." Key to the District

Court's Opinion and Order was the following discussion:

> "b. Qualified Individual
>
> Plaintiff has failed to present sufficient evidence to create a triable factual issue that he was able to perform the essential functions of his position, with or without accommodation. Therefore, [respondent] is entitled to summary judgment on this issue.
>
> An individual is not qualified for his position if he is unable to come to work. *Babrowsky v. New York City Bd. of Educ.*, 1999 WL 737919, a *4 (E.D.N.Y. 1999), *aff'd. mem.* 213 F.3d 625 (2d Cir. 2000)("[t]here could be no reasonable accommodation because attendance is an essential function of her employment"); *Daddazio v. Katherine Gibbs Sch., Inc.*, 1999 WL 228344, a *5 (S.D.N.Y. 1999), *aff'd mem.* 205 F.3d 1322 (2d Cir. 2000)("'[r]egularly attending work' is an essential function of virtually every job")(*Querry v. Messar*, 14 F. Supp. 2d 437, 444-45 (S.D.N.Y. 1998 (ADA does not require an employer to accommodate an employee who cannot get to work). Moreover, the ADA does not require that a position be kept "open indefinitely" while an employee convalesces. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir. 2000)." Pet. App. 20a-21a.

The District Court, in reaching its conclusions, also held "A claim of disability discrimination arising from termination of an employee based on failure to accommodate is not make out under the ADA unless the employee's request for a reasonable accommodation has been denied by the employer." Pet. App. 22a-23a. Because the District Court concluded that petitioner had not actually requested to be reasonably accommodated, respondents were entitled to summary judgment on that issue.

In a Summary Order dated April 11, 2001, the United States Court of Appeals for the Second Circuit affirmed the Opinion and Order of the District Court "Substantially for the reasons stated in Judge Gershon's Opinion and Order dated August 3, 2000."

This Petition for Writ of Certiorari follows because petitioner believes that several fundamental issues, dispositive to the decision sought to be reviewed herein, are in conflict with the decisions of other United States Courts of Appeals on very important issues of reasonable accommodation as they pertain to the ADA. These conflicts should be reconciled by this Court, especially since the ADA is fairly new legislation and many important facets thereof have not yet been ruled upon by this Court. Such review is important so that the rights of disabled employees, including countless police officers and firefighters may be protected.

REASONS FOR GRANTING THE WRIT

1. There Is A Conflict Among The Circuits As To Whether Paid Or Unpaid Leave Constitutes A Reasonable Accommodation Under The Americans With Disabilities Act And Whether Regular And Predictable Attendance Is A Requirement Thereunder

The courts below refused to consider the propriety of respondents extending petitioner's leave, as a reasonable accommodation, and, instead, concluded that petitioner's then present inability to work rendered him unqualified to perform the essential functions of his position. This conclusion was buttressed by citations to courts within the Second Circuit. However, the rationale of the courts below is in conflict with conclusions reached in other Circuits.

Circuits have disagreed about whether paid or unpaid leave, or the extension thereof, can constitute a reasonable accommodation under the ADA. Some courts, such as those in the within case, have presumed that regular and predictable attendance is an essential element or regular job requirement and that an employer is not required to provide leave as an accommodation. *See also*, *Tyndall v. National Education Centers Inc.*, 31 F.3d 209 (4th Cir. 1994); *Carr v. Reno*, 23 F. 3d 525, 530 (D.C. Cir. 1994); *Jackson v. Dept. of Veterans Administration*, 22 F. 3d 277, 278-79 (11th Cir. 1994). Such holdings lead to the conclusion that someone on leave, and without present ability to work, is automatically unqualified under the ADA's *prima facie* showing. These courts, such as the ones below, would reject the idea that attendance is not an essential function as defined by the ADA and that leave, itself, may be a reasonable accommodation and that the employee, therefore, need not show a present ability

to work.

Other Circuits disagree and have concluded that attendance is not an essential function, as defined by the ADA, and that leave may be a reasonable accommodation. For example, in *Cirado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998), the First Circuit upheld a jury verdict finding that IBM had violated the ADA by firing an employee who requested temporary leave to receive treatment for depression. The court held that the request for leave was a reasonable accommodation and did not unduly burden IBM. *Id.* at 444. With particular relevance to the case at bar, the First Circuit also rejected IBM's justification that it never received a note from the employee's doctor requesting the leave. The First Circuit further rejected IBM's claim that it had already accommodated the employee by granting previous leaves. In doing so, the First Circuit held that the duty to accommodate is "a continuing one." *Id.* at 445. These rulings conflict with those of the courts below in the case at bar.

A similar result was reached by the Sixth Circuit in *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998). There, the Sixth Circuit agreed that the "presumption that uninterrupted attendance is an essential job requirement improperly dispenses with 'appropriate burden shifting analysis.'" The court also noted that "the presumption eviscerates the individualized attention that [this Court] has deemed 'essential' in each disability claim." *School Board of Nassau County v. Arline*, 480 U.S. 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). In *Arline*, this Court had held that in order to determine whether a disabled person is otherwise qualified "the district court will need to conduct an individualized inquiry and make appropriate findings of fact." *Id.* at 287, 107 S.Ct. 1123. As the court in *Cehrs* further noted, "If we were to presume that

uninterrupted attendance in all instances is a mandatory job requirement, then the policies and needs of both the individual employer and employee would never be considered." *Id.* at 782.

The Sixth Circuit in *Cehrs* also concluded that the presumption "leads to an illogical consequence" and citing the Family and Medical Leave Act noted "Congress has already determined that uninterupted attendance in the face of a family medical emergency is not a necessary job requirement and does not unduly burden employers." *Id.* at 783. Thus, the Sixth Circuit concluded, in obvious disagreement with the courts below, that "no presumption should exist that uninterrupted attendance is an essential job requirement, and find that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances." *Id.*

Other Circuits have also held that a leave of absence and leave extensions are reasonable accommodations. For example, in *Rodgers v. Lehman*, 869 F.2d 253, 259 (4th Cir. 1989), the Fourth Circuit, in a Rehabilitation Act case, approved of a leave of absence as a reasonable accommodation for alcoholics. The Ninth Circuit, in *Kimbro v. Atlantic Ridgefield Co.*, 889 F.2d 869, 878-79 (9th Cir. 1989), interpreted a Washington state statute to provide leave as a form of accommodation. In *Kimbro*, the Ninth Circuit recognized that an employee who suffered from acute migraine episodes was justified in seeking leave as an accommodation, where the leave would have permitted his doctor to formulate an effective treatment and to eventually adequately perform his job. The court in *Kimbro* concluded, that "as long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable

for failing to attempt that accommodation." *Id.* at 879. *See also, Haschmann v. Time Warner Entertainment Co.*, 151 F. 3d 591, 602 (7th Cir. 1998).

Federal regulations are also in accord. For example, 29 C.F.R. Pt. 32, App. A(b), states that a reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that is likely to respond to treatment." The EEOC Interpretive Guidance on the ADA, 29 C.F.R. Pt. 630, App., states that a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." The EEOC document entitled "Enforcement Guidance : Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act" is also enlightening. It states "Permitting the use of accrued paid leave or unpaid leave, is a form of reasonable accommodation, when necessitated by an employee's disability." Moreover, it states that an employer may not automatically terminate an employee after he/she has been on leave for a certain period of time if the employee with a disability needs leave beyond the said period. The employer must then modify its policy to provide additional leave and hold open an employee's job. Moreover, the employer may not penalize an employee for work missed during leave taken as a reasonable accommodation.

These Circuits[1] and regulations, which are in conflict

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[1] District Courts, including *Schmidt v. Safeway Inc.*, 864 F. Supp. 991 (D. Oregon 1994) and *Norris v. Allied-Sysco Food Services Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996), are examples of decisions where District Courts have

with other Circuits including the Second Circuit in the case at bar, clearly state that medical leave may be a reasonable accommodation under the ADA. Even an extended medical leave or an extension of an existing leave period may be a reasonable accommodation. Therefore, under the authority of these Circuits, petitioner's medical leave was a reasonable accommodation and his then present inability to work during the leave period should not have automatically rendered him unqualified. It should have, instead, created a question of fact as to the reasonableness of the accommodation and resulted in the denial of respondents' motion for summary judgment. *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 896 (7th Cir. 1996).

This conclusion should have been clear on the record that was developed in the District Court. The record established that petitioner's medical authorities had opined that he would be able to return to work in the not too distant future and petitioner, himself, had advised respondents that his condition was improving. In addition, respondents have an unlimited sick leave policy and will routinely maintain a Police Officer on leave for up to eighteen months before rendering a suitability determination. We will also remember that one of the Police Surgeons advised petitioner that a decision would not be forthcoming for another six months at a time when the Police Surgeons' Office had already determined that petitioner be dismissed.

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held that a leave of absence was an accommodation under the ADA. In *Norris*, the court held that "an unpaid leave of indefinite duration or a very lengthy period, such as one year, may constitute a reasonable accommodation under the ADA." *Id.* at 1439. The court was particularly swayed by the employer's leave policy. *Id.* at 1440.

The foregoing discussion has revealed that the decision below conflicts with the holding of other Circuits with respect to whether paid or unpaid leave constitute a reasonable accommodation under the Americans with Disabilities Act and whether regular and predictable attendance is a job requirement thereunder. Both of these issues are important aspects of the ADA, which should be reviewed and reconciled by this Court. Upon such review, the decision below should be reversed.

2. There Is A Conflict Among The Circuits As To Whether An Employee Must Request That He/She Be Reasonably Accommodated In Order To Invoke The Reasonable Accommodation Provisions Of The Americans With Disabilities Act

The courts below found that their belief that petitioner had never actually requested to be reasonably accommodated was dispositive. Other Circuits and authority, however, would reach a opposite decision and rule that an employee does not have to actually request to be accommodated under the ADA. This Court must reconcile the difference.

The ADA does not require a plaintiff "to speak any magic words before he is subject to its protections. The employee need not mention the ADA nor even the term 'accommodation.'" However, when an employer knows an employee has a disability, then the duty to accommodate attaches. *See*, *Schmidt v. Safeway, Inc.*, *supra*. at 997. A similar result was reached in *Cirado v. IBM Corp.*, *supra*.. There, the court found the fact that the employer was on notice that the employee was suffering from a disability and needed time to adjust to be dispositive. The First Circuit continued that the crucial criteria is whether the employer is

aware of the difficulties. If so, it must assist the employee in determining the necessary specific accommodations. *See also, Hendricks-Robinson v. Excel Corp.*, 154 F. 3d 685, 694 (7th Cir. 1998) ("a request as straight forward as asking for continued employment is a sufficient request for accommodation."); *Bultemeyer v. Fort Wayne Community School*, 100 F. 3d 1281, 1285 (7th Cir. 1996) Unlike the courts below, these courts concluded that whether an employee actually asks to be accommodated is not dispositive.

The Sixth Circuit in *Cehrs v. Northeast Ohio Alzheimer's Research Center, supra.*, is also in conflict with the decisions below. The court there held "The employee's initial burden of articulating a reasonable accommodation need not be onerous. For purposes of a prima facie showing, the plaintiff must merely 'suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. *Id.* at 781. There can be no question that, upon the record herein, had the courts below applied this standard, summary judgment would have been denied.

The Ninth Circuit in *Kimbro v. Atlantic Ridgefield Co., supra.*, also minimized the need for an employee to actually request to be accommodated. The key factor, held the court, was whether the employer had sufficient knowledge of the disabling condition. The court noted that the employer could not be responsible for any failure to attempt a reasonable accommodation where it did not have sufficient knowledge of the disabling condition. *Id.* at 875. Thus, summarized the court, "an employee's failure to formally request an accommodation -- as occurred in this case -- does not absolve the employer of its obligation to reasonably accommodate its employee's disabilities." *Id.* at 877.

The decisions below are also in conflict with the EEOC's Enforcement Guidance, previously identified. Firstly, the Enforcement Guidance states that a request for reasonable accommodation need not be in writing. Individuals may request accommodation in conversations or may use any other mode of communication. Surely, petitioner's doctor's note and his conversations with the Police Surgeons were probative and the search of the courts below for a specific request should not have been dispositive. The Enforcement Guidance also tells us that a family member [i.e. petitioner's father], health professional or other representative may request an accommodation on behalf of the individual.

Moreover, the Enforcement Guidance further states that there are circumstances when an employer should initiate the reasonable accommodation interactive process, without being asked, in circumstances where the employer knows that the employee has a disability and knows or has reason to know that the employee is experiencing workplace problems because of the disability. Moreover, according to the Enforcement Guidance, "An employer may not assert that it never received a request for reasonable accommodation, as a defense to a claim of failure to provide reasonable accommodation, if it actively discouraged an individual from making such a request." EEOC Enforcement Guidance at Footnote 100.

The record is very clear that respondents, as a result of petitioner's regular visits to the Police Surgeon, were aware of petitioner's disability, his prognosis and his obvious need to be accommodated. Respondents should have understood that petitioner required an accommodation, such as extended leave, without petitioner being required to make a formal request. Instead, respondents lulled petitioner into

believing that he would not be terminated and that he would be given a full and fair opportunity to recover and return to work. For example, we wili remember that one of the Police Surgeons represented to petitioner that nothing would occur for an additional six months. In doing so, respondents actively discouraged petitioner from making any specific accommodation request and from returning to work. By doing so, respondents violated the reasonable accommodation dictates of the ADA.

Unfortunately, the courts below interpreted the reasonable accommodation provisions of the ADA in a restrictive manner, which is at odds with other Circuits and EEOC guidelines. This Court should grant the within petition in order to review, clarify and reconcile the differing decisions in the Circuits with reference to the important reasonable accommodation issues contained herein. Upon such review, this Court must reverse the courts below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Filed April 11, 2001]

No. 00-9146

GARY MAZZA,
Plaintiff-Appellant,

v.

WILLIAM BRATTON, as Commissioner of the New York City Police Department, RAYMOND P. KELLY, as Commissioner of the New York City Police Department, LEE P. BROWN, as Commissioner of the New York City Police Department, THE NEW YORK CITY POLICE DEPARTMENT and THE POLICE PENSION FUND ARTICLE II OF THE NEW YORK CITY POLICE DEPARTMENT,
Defendants-Appellees.

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of April two thousand one.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE JOSE A. CABRANES, Circuit Judges.

HONORABLE DAVID G. TRAGER, District Judge*

Appearing for Appellant: Alan E. Wolin, Wolin & Wolin, Jericho, N.Y.

Appearing for Appellees: Sharyn Rootenberg, Ass't Corp. Counsel, N.Y., N.Y.

Appeal from the United States District Court of the Eastern District of New York.

This cause came on to be heard on the record from the United States District Court for the Eastern District of New York, and was argued by counsel.

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*Honorable David G. Trager, of the United States District Court for the Eastern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Gershon's Opinion and Order dated August 3, 2000.

We have considered all of plaintiff's contentions on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk
by:
/s/_____

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[August 3, 2000, Decided]
[August 4, 2000, Filed]

Case No. 94 CV 5065 (NG) (CLP)

GARY MAZZA,
Plaintiff,

v.

WILLIAM BRATTON, as Commissioner of the New York City Police Department, RAYMOND P. KELLY, as Commissioner of the New York City Police Department, LEE P. BROWN, as Commissioner of the New York City Police Department, THE NEW YORK CITY POLICE DEPARTMENT and THE POLICE PENSION FUND ARTICLE II OF THE NEW YORK CITY POLICE DEPARTMENT,
Defendants.

OPINION AND ORDER

GERSHON, United States District Judge:

Gary Mazza was terminated as a probationary patrolman with the New York City Police Department ("NYPD") on February 25, 1993, after he had been out sick almost ten months with severe ulcerative colitis. He filed a claim of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"), which rejected his claim on the ground that, although Mazza was disabled, he was not a qualified person with a disability because, at the time of termination, he could not perform the essential functions of his job as a police officer, with or without accommodation. (Def. Ex. H).[1] This action followed, naming as defendants several former NYPD Commissioners, the NYPD and an NYPD Pension Fund (referred to herein collectively as "NYPD" or "defendant"). The complaint alleges disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* and the New York State Human Rights Law, N.Y. Exec. L. §§ 290 *et seq.* Plaintiff seeks reinstatement, back pay and benefits, and damages. Plaintiff also claims that he was wrongfully deprived of a pension and/or the opportunity to apply for a pension. Although the complaint is unclear as to whether the claims relating to the pension are based on federal as well as state law, plaintiff has explained in his memorandum and at oral argument of this motion that the claims are based on

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[1] "Def. Ex." and "Pl. Ex." refer to the exhibits submitted by defendants and plaintiff, respectively, in connection with the summary judgment motion. "Tr." designates the pages of the deposition transcript of the party identified.

alleged violation of his rights under his contract and provisions of the New York State Constitution and state law, not the federal Constitution or statutes.

Defendant now moves for summary judgment on the ADA claim, on the grounds that plaintiff has not raised factual issues that he was disabled, qualified, wrongfully denied a reasonable accommodation, or improperly terminated. Defendant argues that plaintiff cannot establish: (1) that his condition substantially limited major life activities, as required to show a "disability" under the ADA; (2) that plaintiff could perform the essential functions of a police officer, with or without reasonable accommodation; and (3) that he ever requested a reasonable accommodation. Defendant also argues that plaintiff's claims relating to a pension should be rejected as a matter of law, contending that any rights plaintiff may have had as a probationary patrolman were automatically extinguished upon his termination, and further that the court should not exercise supplemental jurisdiction over the state law claims upon dismissal of the federal claims.

A. The Facts

Unless otherwise indicated, the facts set forth below are undisputed.

Gary Mazza was employed as a probationary police officer with the NYPD beginning October 15, 1990. He graduated from the Police Academy in April 1991, and entered upon duty as a police officer. Before he developed the colitis condition, plaintiff had been recorded as being out sick on six occasions, leading automatically to his designation by

computer as a "chronic category B officer" because of the total number of illnesses and days of work missed within a year.[2]

When plaintiff returned from vacation toward the end of April 1992, he began suffering diarrhea and bloody stool. On May 2, 1992, plaintiff collapsed and was taken to St. Vincent's Medical Center in Staten Island, where he was diagnosed and treated for severe ulcerative colitis. Plaintiff was admitted to St. Vincent's and treated three or four times between May 2 and June 14, 1992, and remained hospitalized for over thirty days in that period. (Pl. Exs. L, M, N). While hospitalized, plaintiff experienced numerous bloody bowel movements, averaging about eight per day during severe periods, and was described as dehydrated and "quite symptomatic" upon his second admission. (Pl. Ex. M). Colitis is inflammation of the colon, part of the gastrointestinal tract. In severe cases, the patient also can experience severe abdominal pain, cramps and "bowel urgency" (a feeling of

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[2]The parties devote considerable attention to details of these absences and to unsatisfactory performance ratings that plaintiff received; plaintiff endeavors to show that he was treated unfairly by his superiors and discriminated against after being designated "category B," while defendant seeks to portray plaintiff as a poorly-motivated and problematic probationary patrolman with a poor attendance record. These details are omitted, since they are irrelevant to this motion. There is no genuine factual dispute that the NYPD terminated plaintiff based on his medical condition, not on his performance as a police officer, and it is not disputed that this medical condition was an actual one, whether or not it rose to the level of a "disability" under the ADA (and I find *infra* that it did).

having to make a bowel movement immediately) in addition to the symptoms described above. (Pl. Ex. P). When symptomatic, a person with colitis will need to relieve himself very suddenly, and can soil himself. During and after his hospitalizations, plaintiff was placed on numerous anti-inflammatory and other medications, including corticosteroids. (Pl. Exs. N, V). Plaintiff continued to be medicated in the following years, and apparently will have to take some medications for the rest of his life. In some cases, medication is not successful in controlling the inflammation and surgery to remove the affected area is required. (Pl. Ex. S, at 5).

Plaintiff in his deposition (Tr. 276-80) described his symptoms during and in the months following his hospitalizations as diarrhea, loose and bloody stool, cramps (including stomach cramps resulting from medication), nausea, gas, bowel urgency, weight loss, dehydration, fatigue, pain and hemorrhoids. Plaintiff explained that at the relevant time he had good and bad days, and that there were days that he suffered few or no symptoms and other days where he would have to make bowel movements ten times (*Id.* at 279). Plaintiff's affidavit submitted in opposition to the summary judgment motion (at ¶ 45) describes the symptoms he experienced as "severe diarrhea, bloody and loose stool, inflammation, severe cramps, nausea, loss of appetite, loss of weight, gas, severe pain in different degrees, dehydration, fever, sleep deprivation, fatigue, mood changes, sexual disfunction, severe joint pain and anemia, due to loss of blood . . . [and] fissures, hemorrhoids and cracks to my rectal area [that] were very painful." He alleges in his affidavit (at ¶ 46) that as a result, he "had difficulty cooking, cleaning, shopping, showering, engaging in personal hygiene, sitting up

in bed, washing clothes and changing clothes," avoided "social activities," and was "bedridden" at times. Plaintiff's affidavit fails to describe the degree of "difficulty" he allegedly had in performing these activities.

Plaintiff further testified at his deposition (Tr. 292-93) that his condition improved "around the time of the termination" in February 1993 with the use of the medications. Thereafter, although he suffered flareups, including incidents where he soiled himself, and lacked energy some days, plaintiff's bowel movements and cramping decreased, and his condition did not affect his ability to bathe, go shopping, drive, learn, exercise, do recreational activity or work. (*Id.* at 292-97). Plaintiff maintained that he would have been able to work with only the accommodation of being allowed to use bathrooms as needed. (*Id.* at 300-02). Plaintiff's testimony in this respect differs significantly from the allegations of the complaint, which alleges that his condition rapidly improved after his hospital discharge on June 14, 1992, that in July he began requesting that he be restored to duty with reasonable accommodations in anticipation of his return to full duty, and that the symptoms of his disease had disappeared before he was terminated (Comp. ¶¶ 29-31).

Dr. Stanley Edelman, a NYPD District Surgeon, saw plaintiff on June 29, 1992. He reviewed the hospitalization records that showed that plaintiff had experienced severe episodes of bleeding ulcerative colitis, and that he had been placed on various medications. (Edelman Tr. 26). In subsequent biweekly visits, Dr. Edelman continued plaintiff on sick leave. (*Id.* at 29-31). After plaintiff's visit on August 28, 1992, Dr. Edelman recommended that plaintiff's

employment be terminated, a recommendation that plaintiff claims without contradiction was concealed from him before his actual termination almost six months later, although Dr. Edelman continued to meet with plaintiff regularly to extend his sick leave. Dr. Edelman explained that, as of August 28, he had concluded that plaintiff was very sick, that he had a very serious and debilitating case of ulcerative colitis complicated by bleeding, multiple bowel movements and weight loss, and that he would eventually require major colon surgery. Dr. Edelman concluded that plaintiff's prognosis was poor. Plaintiff had failed to improve clinically despite multiple medications, including steroids, and Dr. Edelman felt that plaintiff was unable to work, would be unable to perform the functions of his job in the near future and that his future ability to be a full-duty police officer was in serious doubt. (*Id.* at 29-30, 34).

Dr. Edelman acknowledged that plaintiff would have been capable of doing clerical work if his condition had been under better control with medication, although even then plaintiff's ability to perform the full range of police work remained highly questionable. (*Id.* at 37, 41-42). Dr. Edelman testified that plaintiff had not stated that he was able to work as of the time that termination was recommended. (*Id.* at 32). Although Dr. Edelman did not recall ever having discussed with plaintiff the possibility of modifying his job duties to enable him to continue working as a police officer (*id.* at 47), the transcript of a conversation between plaintiff and Dr. Edelman in October 1992 shows that in fact, Dr. Edelman had suggested that plaintiff return to light duty or clerical work, perhaps at his local precinct so that he would not have to travel, but that plaintiff insisted he was completely unable to work. (Def. Ex. G). This conversation, and others

by plaintiff with Dr. Edelman and another NYPD surgeon, Dr. Leah Dann, were secretly recorded by plaintiff, but plaintiff has not attached transcripts or produced tapes of any of those conversations in his response to the motion although he uses a few selected purported quotations from those conversations to claim that he was not treated fairly. The tapes were turned over to defendant in discovery. The transcript of the above conversation prepared by defendant even quotes Dr. Edelman referring to the obligation of the NYPD under the ADA to accommodate someone with colitis who was able to perform some work. Dr. Edelman stated, "I don't know why you're not able to -- sit at a desk and answer a telephone." Plaintiff responded, "It's pretty obvious," but Dr. Edelman replied, "No, it isn't obvious." (Def. Ex. G, p.5).

Notwithstanding this tape, plaintiff insists in general terms that, before February 1993, he had requested to be allowed to return to work with the accommodation of being allowed to work near a bathroom. (Mazza Aff. ¶ 51). He fails to identify to whom he communicated this request, or when. Instead, plaintiff's affidavit cites to paragraph 30 of the complaint, which as noted above, is refuted by his own deposition testimony, and also cites to pages of his deposition testimony that likewise do not identify any communications. Plaintiff's affidavit (at ¶ 52) then proceeds to quote from the affidavit he gave before the EEOC (Pl. Ex. T), which like the complaint is hearsay in this proceeding, and plaintiff does not now swear to its truth. Plaintiff asserted in his EEOC affidavit that, in October 1992, he had requested of Dr. Edelman that he be allowed to return to work with an accommodation, but was not allowed to -- which is directly contrary to the recorded conversation described above. Plaintiff has not

attempted in his papers to explain this recorded conversation and, significantly, plaintiff has not attempted to explain his inability to produce a recorded conversation that corroborates his claim although he "routinely tape recorded the conversations" with NYPD doctors without their knowledge. (Mazza Aff. ¶ 75). Plaintiff's EEOC affidavit also claimed that in December 1992, plaintiff's father had requested of NYPD Surgeon Dr. Leah Dann that plaintiff be allowed to return to work with accommodation, but plaintiff has not submitted any evidence of that alleged conversation in response to the summary judgment motion.

Plaintiff also alleges that he was lulled by the NYPD surgeons into believing that his job was not in jeopardy before he was terminated. He quotes Dr. Edelman and Dr. Dann on October 6, 1992, as assuring him that no one was interested in terminating him now, he should not worry, and that maybe if there was no improvement in six months they would have to "look hard" at his situation. (*Id.*). Plaintiff further quotes Dr. Edelman as telling plaintiff and plaintiff's father in a recorded telephone conversation on November 20 that plaintiff would be returning to work the next week, and Dr. Edelman would try to arrange for plaintiff to work at his local precinct. (*Id.* ¶ 76). Yet, plaintiff does not attempt to explain why he did not in fact return to work in the week after November 20. Plaintiff also does not assert that he had followup discussions with anyone when he did not return to work as Dr. Edelman had allegedly promised, as would have been expected if plaintiff wanted to and was able to return to work. Plaintiff does not submit transcripts of these conversations.

On December 10, 1992, Dr. Dann recommended that plaintiff be terminated. (Def. Ex. A). Her memorandum to the Supervising Chief Surgeon states that plaintiff had been out sick since May 2 with active inflammatory bowel disease, "has a biopsy proven IBD and has had cramps and bloody diarrhea (6-8 times/day) since then," and was on corticosteroids and 6-mercaptopurine (a drug that affects immune cells involved in inflamation, see Pl. Ex. S at 4-5). Dr. Dann recommended termination in view of plaintiff's "continued disease activity, with no possibility to be restored to full duty in the near future" after being out sick for seven months. Dr. Robert Thomas, the Supervising Chief Surgeon, concurred, noting plaintiff's "serious intestinal condition," his required "use of strong therapeutic agents which have the potential of serious side effects," and the fact that his disease still was not in remission despite these measures.

Plaintiff's treating physician, Dr. Prasanna Wickremesinghe, gave plaintiff a note dated January 6, 1993, which plaintiff submitted to the NYPD, reading as follows: "This patient is still under intensive medical therapy for chronic universal ulcerative colitis. Should he respond favorably he will be able to resume his previous duties with some accommodations." (Pl. Ex. U). Although plaintiff asserts that Dr. Wickremesinghe "intended to mean that I was responding favorably and that I could then return to duty with some accommodation," (Mazza Aff. ¶ 54), the note clearly does not so state, nor has Dr. Wickremesinghe supported plaintiff's interpretation of the note even though he has submitted other statements on plaintiff's behalf. (Pl. Ex. V).

In March 1993, after plaintiff's employment had been terminated on February 25, medical testing revealed that

plaintiff's colitis had improved substantially. (Pl. Exs. DD, EE, FF). His symptoms thereafter were controlled more successfully with medication, and his doctors determined that surgery was not needed. Plaintiff has submitted letters from doctors that describe this improvement or the prognosis for a typical patient with colitis (Pl. Ex. V) but, contrary to plaintiff's characterizations, those letters do not offer opinions on the severity of plaintiff's condition or his ability to work before he was terminated. The letter most favorable to plaintiff was submitted by Dr. David Sachar, Professor of Medicine, Director of the Division of Gastroenterology and Vice Chairman of the Department of Medicine at Mount Sinai Hospital. (Pl. Ex. DD). Dr. Sachar did not examine plaintiff until 1995, but upon review of the medical records, he asserted that the decision to terminate plaintiff based on "his successful treatment program . . . seems to me unjustifiable in science, law, or common sense."[3] Other letters simply offer observations as to the ability of a typical individual who has colitis to work, and that ulcerative colitis does not automatically exclude an individual from police work. (Pl. Ex. V).[4]

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[3]Dr. Sachar's letter also states: "Needless to say, the fact that Mr. Mazza's condition suddenly and unexpectedly deteriorated years later following a Salmonella infection is totally irrelevant to the question of his termination in January 1993." This later event is not mentioned elsewhere in the record.

[4]Defendant challenges the admissibility of two letters from doctors that state that plaintiff has "chronic universal ulcerative colitis" and briefly address the condition generally. These letters are worded identically and are not signed. (Pl. Exs. Q, R). Since the information they contain is cumulative of information otherwise

B. Discussion

1. Standard of Review

Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In evaluating whether a genuine issue of material fact exists, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). These standards are applicable to the resolution of summary judgment motions involving ADA claims. *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 149 (2d Cir. 1998).

2. Disability Discrimination Under the ADA

This court recently reviewed the requirements for a plaintiff to establish a *prima facie* case of disability discrimination under the ADA:

> The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees. . . ." 42 U.S.C. § 12112(a). A plaintiff bringing a claim of discriminatory

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part of the record, the objection need not be considered.

discharge under the ADA bears the initial burden of establishing a prima facie case of discrimination. To meet this burden, a plaintiff must show that: (1) her employer is subject to the ADA; (2) she suffers from a disability within the meaning of the ADA; (3) she could perform the essential functions of her job with or without reasonable accommodation; and (4) she was fired because of her disability. *See Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 869-70 (2d Cir. 1998). The ADA describes an individual as suffering from a "disability" if she makes a showing of any one of the following: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Only a 'qualified individual with a disability' may state a claim for discrimination under the ADA;" even if a plaintiff alleges a firing because of a medical condition, she can bring a claim under the ADA only if her medical condition rises to the level of a "disability." *Parker v. Sony Pictures Entertainment, Inc.*, 19 F. Supp. 2d 141, 147 (S.D.N.Y. 1998) [*rev'd in part on other grounds sub nom. Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000).]

Sacay v. Research Found. of the City Univ. of New York, 44 F. Supp. 2d 496, 500 (E.D.N.Y. 1999).

a. Disability

Defendant argues that plaintiff has failed to produce evidence raising a factual issue that he suffers from a "disability" within the meaning of the ADA. In making this argument, defendant flatly contradicts its position before the EEOC, where it successfully urged that plaintiff was so disabled that his termination without accommodation was justified. The argument is without merit because plaintiff has produced sufficient evidence that he was actually impaired, and also that he was regarded as being impaired, within the meaning of subsections (a) and (c) of 42 U.S.C. § 12102(2) quoted above.

In evaluating a claim of disability under the ADA, the court follows a three-step process to determine: (1) whether plaintiff had an impairment; (2) whether the impairment affected a "major life activity" within the meaning of the ADA; and (3) whether that major life activity was substantially limited by the impairment. *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998); *Sacay*, 44 F. Supp. 2d at 500.

Plaintiff has an impairment, defined in the regulations under the ADA as including "[a]ny physiological disorder, or condition" affecting the digestive system. 29 C.F.R. 1630.2(h)(1); *Johnson v. New York Med. College,* 1997 WL 580708, at *5 (S.D.N.Y. 1997) ("the Court is convinced that colitis is a 'physical impairment' within the meaning of the ADA").

The evidence also would support a finding that the impairment affected "major life activities," which includes under the regulations functions such as "caring for oneself"

and "working". 29 C.F.R. 1630.2(i). The Supreme Court has recently questioned the authoritativeness and persuasiveness of the regulations and EEOC interpretations, and specifically has questioned the inclusion of "working," *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 2151 (1999), but the Second Circuit in post-Sutton decisions has continued to view the regulations and agency interpretations as entitled to substantial deference in interpreting the ADA, and has specifically continued to treat working as a major life activity. *Heyman v. Queens Village Comm. for Mental Health*, 198 F.3d 68, 72-73 (2d Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 312 & n.5 (2d Cir. 1999).

In *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir. 1998), the Circuit assumed without deciding that "the ability to control one's elimination of waste is a major life activity," but then proceeded to find that plaintiff had failed to raise a triable issue of fact that her colitis was a substantial limitation upon that activity, or that other major life activities were substantially limited. The symptoms described by plaintiff in this case, supported by the medical evidence in this record, satisfy the court that the trier of fact could find that plaintiff's impairment affected major life activities.

Plaintiff has also introduced sufficient evidence to create a triable issue of fact that he was "substantially" limited in the activities of controlling elimination of wastes and working. *Ryan* emphasized that its decision against plaintiff was limited to its facts, where Ryan was asymptomatic for long periods,-suffered severe symptoms only in the summer, and did not miss work because of her colitis. *Id.* at 871-72. The court described its determination as "fact specific," explaining that it "does not mean that colitis may never

impose such a limitation." *Id.* at 872; *see Reeves*, 140 F.3d at 151-52 (describing *Ryan* as mandating case-by-case inquiry of the effect of colitis on the major life activity of the individual's ability to care for oneself). Other cases which have evaluated colitis or similar conditions, and that have reached differing results, similarly are fact-specific. *See Johnson v. New York Med. College, supra* (summary judgment granted against plaintiff whose colitis did not affect her ability to work); *Caporilli v. City of Rome*, 1992 WL 209327 (N.D.N.Y. 1992) (finding for defendant after non-jury trial); *Ferguson v. West Carolina Reg'l Sewer Auth.*, 914 F. Supp. 1297 (D.S.C.), *aff'd mem. on other grounds*, 104 F.3d 358 (4th Cir. 1996) (summary judgment against plaintiff with "irritable bowel syndrome" and other ailments); *Jones v. Hodel*, 711 F. Supp. 1048, 1048-49 (D. Utah 1989) (plaintiff who had colon removed because of chronic ulcerative colitis is disabled); *Branch v. City of New Orleans*, 1995 WL 295320 (E.D. La. 1995), *aff'd mem.*, 78 F.3d 582 (5th Cir. 1996) (jury verdict in favor of defendants sustained where plaintiff's symptoms were in remission). In *Sacay*, 44 F. Supp. 2d at 501-02 & n.1, similarly, this court dismissed the complaint for failure to set forth factual allegations that were necessary to allege that plaintiff's colitis and other ailments substantially limited a major life activity.

In this case, plaintiff has described severe limitations upon his ability to control elimination of wastes and to work during the relevant period, and the hospital records and undisputed medical evidence substantiate the severity of his condition. A trier of fact could reasonably find that plaintiff was disabled.

Plaintiff has failed to create a triable issue that he was substantially limited in the major life activity of caring for oneself. Plaintiff's conclusory assertion in his affidavit, unsupported by any details or by his deposition testimony, that he had "difficulty" in performing such routine tasks as cooking, cleaning, shopping and showering is insufficient to make a *prima facie* showing that his ability to care for himself was substantially limited. *Ryan*, 135 F.3d at 871-72.

The court also concludes, in the alternative, that plaintiff has presented sufficient evidence to show that he has a disability under the ADA because defendant regarded him as having an impairment which substantially limited major life activities, not just his ability to perform a particular specialized job. *See Murphy v. United Parcel Serv.*, 527 U.S. 516, 119 S. Ct. 2133, 2137-38 (1999); *Heyman*, 198 F.3d at 73; *Reeves*, 140 F.3d at 153-54. Since defendant terminated plaintiff in the belief that plaintiff was seriously disabled, unable to work, and that his prognosis was poor, defendant cannot now claim that there is not even a genuine factual issue concerning whether defendant regarded plaintiff as disabled.

b. Qualified Individual

Plaintiff has failed to present sufficient evidence to create a triable factual issue that he was able to perform the essential functions of his position, with or without accommodation. Therefore, defendant is entitled to summary judgment on this issue.

An individual is not qualified for his position if he is unable to come to work. *Bobrowsky v. New York City Bd. of Educ.*, 1999 WL 737919, at *4 (E.D.N.Y. 1999), *aff'd mem.*,

213 F.3d 625 (2d Cir. 2000) ("[t]here could be no reasonable accommodation because attendance is an essential function of her employment"); *Daddazio v. Katharine Gibbs Sch., Inc.*, 1999 WL 228344, at *5 (S.D.N.Y. 1999), *aff'd mem.*, 205 F.3d 1322 (2d Cir. 2000) ("'[r]egularly attending work' is an essential function of virtually every job"); *Querry v. Messar,* 14 F. Supp. 2d 437, 444-45 (S.D.N.Y. 1998) (ADA does not require an employer to accommodate an employee who cannot get to work). Moreover, the ADA does not require that a position be kept "open indefinitely" while an employee convalesces. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir. 2000).

Plaintiff offers no medical or other evidence to support his conclusory claim in this action that he was able to work at the time of his termination. On the contrary, the note from plaintiff's treating physician, Dr. Wickremesinghe, states that plaintiff would be able to return to his duties with accommodations if he responded favorably to intensive medical therapy. The clear import of this note, written after plaintiff had missed work for eight months following his first hospitalization for colitis, is that plaintiff still could not report for work even with accommodations, and it was not yet known if plaintiff would be able to do so in the future. Moreover, since plaintiff had already undergone intensive medical therapy for most of this eight month period and remained unable to work, Dr. Wickremesinghe's note did not provide a basis for optimism. It necessarily confirmed the evaluation of NYPD physicians that plaintiff's prognosis was poor. Plaintiff's interpretation of Dr. Wickremesinghe's note, as meaning that plaintiff had improved and was now able to work with accommodations, is contradicted by the plain language of the note, not supported by other statements

plaintiff has submitted from that doctor, and does not create a genuine factual issue concerning plaintiff's ability to work.

That plaintiff's condition improved following his termination cannot overcome the undisputed evidence from the earlier time period that plaintiff was not qualified to perform the essential functions of his position, and was not able to report for work at all. Plaintiff cannot salvage his claim with his bald assertion of a belief that he was able to work at the time, unsupported by any medical or other objective evidence. *See Daddazio*, at *5 (granting summary judgment dismissing ADA claim where plaintiff's "conclusory statement" that he was able to perform the essential functions of his job was "belied by the evidence that plaintiff himself has submitted for the Court's review," including medical evidence).

Since plaintiff has failed to raise a genuine issue of fact concerning his ability to come to work at all, it is unnecessary to consider defendant's argument that plaintiff was not qualified to perform the essential functions of the specialized occupation of police officer, and therefore was properly terminated even if he had been able to do administrative work. *Cf. Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998) (analyzing possible duty to accommodate paraplegic firefighter by assignment to specialized bureau).

c. Reasonable Accommodation

A claim of disability discrimination arising from termination of an employee based on failure to accommodate is not made out under the ADA unless the employee's request

for a reasonable accommodation has been denied by the employer. As explained in *Parker*, 204 F.3d at 338, the duty to make reasonable accommodations does not require an employer to hold open a disabled employee's position indefinitely, nor does it require the employer "to investigate every aspect of an employee's condition before terminating him based on his inability to work." The ADA does require that when an employee proposes an accommodation weeks before termination, the employer is obligated to "investigate that request and determine its feasibility. An employer who fails to do so, and instead terminates the employee based on exhaustion of leave, has discriminated 'because of' disability within the meaning of the ADA." *Id.; see Lanci v. Arthur Andersen, LLP*, 2000 WL 329226, at *8 (S.D.N.Y. 2000) (duty of employee to request reasonable accommodation); *Baker v. City of New York*, 1999 WL 33115, at *4 (E.D.N.Y. 1999) (same); *DeMar v. Car-Freshner Corp.*, 49 F. Supp. 2d 84, 95-96 (N.D.N.Y. 1999) (employee who fails to request an accommodation of employer cannot hold employer liable for failing to provide one). *But cf. Durrant v. Chemical/ChaseBank/Manhattan Bank, N.A.*, 81 F. Supp. 2d 518 (S.D.N.Y. 2000) (denying summary judgment even though employee disabled by depression had not tried to return to work and had not requested an accommodation before she was terminated).

Defendant is entitled to summary judgment on this issue. As the review of the facts demonstrates, plaintiff has failed to present any genuine issue of disputed fact concerning his alleged requests for an accommodation. Even if the EEOC affidavit were taken as sworn to in this action, the plaintiff's claim that he made a request for accommodation from Dr. Edelman is not on any of the tapes. In fact, the only tape

presented on this motion that refers to an accommodation shows the opposite. In that tape, plaintiff rejects Dr. Edelman's suggestion that he return to work at a desk job or other restricted duty. Plaintiff admits that he "routinely tape recorded the conversations" with NYPD physicians (Mazza Aff. ¶75). If a conversation took place such as plaintiff described in his EEOC affidavit, he would have been able to produce a tape and transcript of that conversation. Plaintiff has not done so, nor has he attempted to explain his inability to do so. Moreover, plaintiff has not reaffirmed the truth of his statements in the EEOC affidavit in the sworn statement he submitted in opposition to the summary judgment motion. Plaintiff also has not attempted to identify the alleged conversations by date or participants in response to the summary judgment motion. The transcript of plaintiff's conversation with Dr. Edelman, in which plaintiff resists any effort to return to work with reasonable accommodations, is neither challenged nor explained, and completely undermines his position. Having-continued plaintiff on sick leave for almost ten months with no request by plaintiff to return to work in any capacity, without any indication from plaintiff that he could resume his duties soon, and having been presented with evidence of plaintiff's serious medical condition and no evidence that it had improved or was expected to improve imminently, defendant did not engage in unlawful discrimination when it discharged plaintiff.

Conclusion

The motion of the defendants for summary judgment on the ADA claim is granted. The court declines to exercise supplemental jurisdiction over the remaining claims which, as plaintiff acknowledged at oral argument, are based only on

state statutory and constitutional law and common-law breach of contract. Those claims are dismissed without prejudice to their being brought in state court.

SO ORDERED.

/s/_____
NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
August 3, 2000

No. 01-45

In the

Supreme Court of the United States

GARY MAZZA,

Petitioner,

v.

WILLIAM BRATTON, as Commissioner of the New York City Police Department et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 10, 2001

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether an employer is required under the Americans With Disabilities Act to provide a leave of absence for an indeterminate period of time as an accommodation for an employee whose medical condition prevents him from coming to work at all and who cannot predict, after nine months of leave, when he will be able to return to work?

2. Whether an employee must make a request for a reasonable accommodation before complaining that the employer has failed to provide such an accommodation under provisions of the Americans With Disabilities Act?

LIST OF PARTIES

Petitioner

The petitioner, Gary Mazza, has no corporate affiliations.

Respondents

The respondents are: William Bratton, as Commissioner of the New York City Police Department; Raymond P. Kelly, as Commissioner of the New York City Police Department; Lee P. Brown, as Commissioner of the New York City Police Department; The New York City Police Department and The Police Pension Fund Article II of The New York City Police Department.

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The Opinion and Order of the United States District Court for the Eastern District of New York is published at 108 F.Supp. 2d 167 (E.D.N.Y. 2000), and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages 4a-25a.

The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages 1a-3a.

COUNTER STATEMENT OF THE CASE

Petitioner Gary Mazza was appointed to the New York City Police Department ("NYPD") in October, 1990. After completing his training at the Police Academy in April 1991, he was assigned to regular police duties at the 122nd Precinct for his two-year probationary period. Probationary terms are automatically extended by the number of days an officer is out on sick leave. Because of his long sick leave (May 1992-February 1993), at the time of his discharge on February 25, 1993, Mazza was still a probationer.

In April 1992, Mazza began suffering diarrhea and bloody stool. On May 2, 1992, he collapsed and was hospitalized and treated for what was diagnosed as severe ulcerative colitis. In the next six weeks, he was re-hospitalized for a total of 30 days, and as of his hospital discharge on June 14, 1992, took full-time paid sick leave.

Under terms of the NYPD's sick leave policy, Mazza was required to make periodic visits to the NYPD medical office for examinations by a District Surgeon. Mazza was seen at various times by Dr. Stanley Edelman and Dr. Leah Dann. Unknown to the doctors, Mazza secretly tape-recorded at least some of his discussions with them. He later produced copies of these tapes to defendants during discovery in the ensuring lawsuit.

After five examinations (June 29, July 10, July 24, Aug. 18, and Aug. 28, 1992), Dr. Edelman noted that, despite attempts to treat his condition with a variety of medications, including steroids and anti-cancer drugs, Mazza was still suffering "a very serious debilitating case of ulcerative colitis" with complications that "would eventually require major colon surgery." He felt at that time that Mazza's future as a full-duty police officer was "in serious doubt."

However, at that time the Department continued Mazza on paid sick leave. In his EEOC Complaint, Mazza stated that in October, 1992, he asked Dr. Edelman "for an accommodation because I felt I was qualified to work. I was not allowed to report to active duty because I was on medication." He never identified the person he asked or the date. At his deposition (Aug. 14, 1996), he testified that the type of accommodation he wanted was a position that was close to a bathroom; he claimed at his deposition that he could have handled full patrol duty with that accommodation.

The tape recording of Mazza's discussion with Dr. Edelman on October 16, 1992 appears to contradict this statement. In the recording, Mazza is heard saying that "nothing has changed" and he has to go into the hospital again because "something really frightening [is] going on with the medication...and I'm just not feeling right." Dr. Edelman says:

> "There's nothing to worry about. Now I know you got a problem, and I know you're on heavy medication. But why can't you go...and do something for the Police Department? You've been out of work already...six months you've been out, right? If you could travel here, you could travel to a precinct....so you sit at a desk and answer a phone, but do something!"

Mazza responds that he has to consult his private doctor first, to straighten out the medication "because I'm feeling really lousy" and he won't see the doctor for two weeks. Edelman says: "I don't know why you're not able to – sit at a desk and answer a telephone." Mazza replies: "It's pretty obvious." Edelman responds: "No, it isn't obvious." Nowhere on any

tape provided by Mazza does he ask to return to work, nor is he told that he cannot return because he is on medication.

At his deposition (Nov. 6, 1996), Dr. Edelman did not recall the Oct. 16, 1992 conversation; he did testify that at no time prior to his termination did Mazza ever affirmatively state that he was able to return to work. Dr. Edelman further testified that if the colitis had been under control with medication, Mazza would have been capable of doing clerical work. However, Mazza testified at his deposition that he was still experiencing the symptoms of colitis, which included nausea, cramps, gas, bowel urgency, and fatigue, "right up to the end of 1992."

Mazza also stated, in his affidavit opposing summary judgment, that on Nov. 20, 1992, his father had talked to Dr. Edelman, who told him that the NYPD was going to return Mazza to duty, possibly at the precinct nearest his home, "next week." However, Mazza did not return to work.

On December 9, 1992, Dr. Edelman wrote to Dr. Dann to ask her to write up a termination recommendation on Mazza; she did so. She stated that he had "active inflammatory bowel disease...a biopsy proven IBD...cramps and bloody diarrhea (6-8 times/day)...currently on corticosteroids and 6-mercaptopurine." She recommended termination "in view of his continued disease activity, with no possibility to be restored to full duty in the near future and more than seven (7) months of being on sick report."

After discussions with Dr. Edelman on the case, NYPD Chief Surgeon Dr. Robert E. Thomas endorsed the termination recommendation, noting on Dec. 28, 1992, that, despite the use of strong medication, with potential serious side effects, since May 1992, Mazza's "disease is still not in remission."

On January 6, 1993, Mazza submitted a note from his private physician, Dr. Prasanna C. Wickremesinghe, which stated: "This patient is still in intensive therapy for Chronic Universal Ulcerative Colitis. Should he respond favorably, he will be able to resume his previous duties with some accommodations." Mazza testified at his deposition that he understood the note to mean that he could return to work, that the doctor would not have given it to him otherwise. However, he testified that his disease did not actually go into remission until around the end of February, 1993, when he began to respond to the medication.

In the meantime, the termination recommendation was making its way up the chain of command to the Police Commissioner, who authorized it as of Feb. 1, 1993. On February 25, 1993, Mazza was notified that his services as a Probationary Police Officer were terminated.

In June, 1993, Mazza filed a complaint with the EEOC alleging discrimination under the Americans With Disabilities Act ("ADA"). The EEOC's determination, dated Aug. 4, 1994, held that there was no violation, because although Mazza had a disability, he was not a "qualified individual" since he could not perform police duties, with or without accommodation.

Mazza filed this action on October 29, 1994. After discovery, on September 30, 1999, defendants moved for summary judgment, which was granted by the United States District Court for the Eastern District of New York (Gershon, J.) in an opinion and order dated Aug. 3, 2000. See, Opinion and Order reproduced in the Appendix to the Petition for Writ of Certiorari, pp. 4a-25a.

Judge Gershon carefully reviewed the facts in evidence as presented in the Record on Appeal, and determined that (a) Mazza did have a disability that substantially limited him in a

major life activity, or in the alternative, that the NYPD regarded him as having such a disability; (b) he had not shown sufficient evidence to create a triable issue of fact that he was able to perform the essential functions of his position, with or without accommodation, because he could not show that he could get to his workplace to do any type of work even after eight months of treatment while on sick leave; even his own doctor's note of January 1993 said merely that "if he responded favorably to intensive medical therapy" he could return to work; in the Court's opinion, this note "necessarily confirmed the evaluation of NYPD physicians that plaintiff's prognosis was poor" (21a); and (c) he had not presented evidence that created any genuine issue of fact that he had requested an accommodation, and that the tape-recorded conversation of Oct. 16, 1992 with Dr. Edelman "completely undermines his position" (24a). Therefore, Judge Gershon found:

> Having continued plaintiff on sick leave for almost ten months with no request by plaintiff to return to work in any capacity, without any indication from plaintiff that he could resume his duties soon, and having been presented with evidence of plaintiff's serious medical condition and no evidence that it had improved or was expected to improve imminently, defendant did not engage in unlawful discrimination when it discharged plaintiff (24a).

By Summary Order filed April 11, 2001, the United States Court of Appeals for the Second Circuit affirmed the order "substantially for the reasons stated in Judge Gershon's Opinion and Order dated August 3, 2000" (3a).

REASONS FOR DENYING THE WRIT

1. **The Circuits Are Not Split on the Legal Principles Applicable to A Disability Act Plaintiff's Burden to Show That He Was Able to Perform His Essential Duties, Including Showing Up At Work, With or Without A Reasonable Accommodation; Petitioner Simply Failed to Make The Necessary Factual Showing.**

To make a prima facie case under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., a plaintiff must show that even though he has a disability, he is a "qualified individual" who could perform the essential functions of his job, with or without a reasonable accommodation; 42 U.S.C. § 12111(8). On this element, the plaintiff has the burden of proof. See, e.g., Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 33 (1st Cir. 2000); Parker v. Sony Pictures Entertainment Inc., 204 F.3d 326, 332 (2d Cir. 2000); Nicosia v. Yellow Freight System, Inc., 253 F.3d 943 (7th Cir. 2001).

Petitioner failed to make that showing to the satisfaction of the District Court or the Court of Appeals below. In order to create the appearance of conflict among the Circuits for purposes of this Petition, he over-simplifies the applicable principles and states them as per se rules, which they are not. Rather, the two "questions" he presents – whether a leave of absence can constitute a reasonable accommodation, and whether regular attendance at work is an essential job requirement – are both fact-specific inquiries that vary with the circumstances. The different holdings of cases in different Circuits are explained by the different fact-patterns in those cases, not by a difference on the legal standards to apply. There is no conflict requiring resolution

by this Court, and the courts below were correct in their analysis and conclusions under the applicable law.

A. When Is Regular Attendance at Work Essential?

While the cases vary in the wording when they their assert that showing up to do the job is an essential element, they all acknowledge that application of this principle depends on the circumstances of the particular job. For example, in Tyndall v. National Education Centers Inc., 31 F.3d 209, 213 (4th Cir. 1994), which uses strong language in stating: "In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis," the Fourth Circuit also notes that this principle does not necessarily apply if the person can do the job fully from home. Carr v. Reno, 23 F.3d 525, 530 (D.C.Cir. 1994) limits its assertion that "ability to appear for work" is essential, to "any government job." And Jackson v. Dep't. of Veterans Administration, 22 F.3d 277, 278-79 (11th Cir. 1994), cert. dismissed, 513 U.S. 1052 (1994), like the great majority of cases discussing this principle, explicitly states that regular attendance at work is essential because of particular features of the job in question. And see, Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1187-89 (6th Cir. 1996) (regular attendance was essential to customer service job since there was only one such position in the company), Tobias v. Arizona Board of Regents, 1998 U.S. App. LEXIS 30070 (9th Cir. 1998) (attendance at staff meetings was essential part of supervisor's job); Ward, supra (though the court was "inclined to presume that regular and reliable attendance is essential to any job," that presumption did not apply under facts of the case where data-entry clerk could perform his work on a scheduled with irregular hours).

Petitioner unwittingly acknowledges this fact in his quotation from Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998) on the point that to presume that regular attendance is essential would go against the need to make an "individualized" assessment of each situation. In Cehrs, as in the other case petitioner cites as creating a conflict on the "attendance is essential" point, Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), the nature of the plaintiffs' jobs permitted short temporary absences so that, for them, ability to appear for work at all times was not an essential aspect of the job. Thus, there is no conflict among the Circuits on this legal principle, only a difference of results depending on the facts of each case.

In this case, the courts below took into account the uncontested facts that petitioner was a government employee, a police officer, and concluded that for this job, the ability to appear at the workplace and perform work was essential; see, Carr, supra; Querry v. Messar, 14 F.Supp.2d 437, 444 (S.D.N.Y. 1998) (plaintiff was not "otherwise qualified" for her job as a police officer "because she could not perform one of the essential functions of her job - regularly attending work").

B. When Can Leave Be a Reasonable Accommodation?

Similarly, there is no conflict among the Circuits on the legal principles governing whether any particular proposed accommodation is reasonable for a particular disability in a particular job – again, it is a case by case determination. Therefore, petitioner's citations to various Circuits for their language to the effect that a medical leave or an extended leave are reasonable accommodations fails to acknowledge that those courts came to their conclusions in the particular circumstances of each case, rather than as a per se rule of law. Again, one of petitioner's own cited cases, Norris v. Allied-Sysco Food Services Inc., 948 F. Supp.

1418, 1439 (N.D. Cal. 1996), aff'd. without discussion of this point, 191 F.3d 1043 (9th Cir. 1999), cert. den., 528 U.S. 1182 (2000), makes this very point. Norris cited a long list of cases in which a lengthy leave of indefinite duration was found to be unreasonable, but concluded that a per se rule was not appropriate because each case requires analysis of its specific circumstances.

Further, the result advocated by petitioner here - that a further indefinite extension of his eight-month indefinite leave of absence should have been required as a reasonable accommodation - is refuted by cases with similar factual circumstances, from many Circuits. Indeed, the cases with such facts support the result reached by the District Court and affirmed by the Court of Appeals here.

The longer the time a plaintiff was on leave from the job on account of a disability, and the more indeterminate a plaintiff was as to how much more recovery time would be needed, the more likely it is that a court will hold that further extension of a medical leave is not a "reasonable accommodation" as a matter of law. See, e.g., Dudley v. California Dep't. of Transportation, 2000 U.S.App. LEXIS 5249 (9th Cir. 2000) (diabetic supervisor was unable to demonstrate that "any defined period of leave would have allowed her to control her condition" so dismissal after seven months' leave was not discriminatory); Monette, supra, 90 F.3d at 1187, stating: "employers are under no duty to keep employees on unpaid leave indefinitely" (where employee was discharged after being was out eight months); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1226 (11th Cir. 1997) (where employee was discharged when his doctor could not clear him to return to work after ten months' treatment for high blood pressure, a further extension of leave was not a required accommodation, even though employer had a paid leave program that could have been extended up to a year);

Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (where diabetic bus driver sought extended leave to get his condition under control, held: "Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect:" Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (reasonable accommodation does not include any duty to await uncertain results of alcoholic employee's treatment program).[1]

Petitioner's other citations are not to the contrary, since each turns on facts quite different from those here. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989) turned on a sequence of treatment options for alcoholics that is required of the military services before a discharge is permitted; petitioner here is neither an alcoholic nor discharged from the military. Kimbro

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[1] The law is also clear that whether an employee is able to perform the essential functions of the job must be determined on the basis of the facts as of the date the termination decision was made, not any facts that occur thereafter. E.g., Myers v.Hose, 50 F.3d at 283, stating that the ADA regulations "contain no reference to an individual's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as whether an individual "can" (not "will be able to") perform the job with reasonable accommodation." Thus there is no probative value to the coincidence that Mazza's condition finally began to respond to medication shortly after the beginning of February, when the Police Commissioner signed off on the termination recommendation, which had been submitted early in December, well before any improvement was either apparent or foreseeable, and was not rebutted, but was actually supported, by the doctor's note submitted by Mazza in January.

v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989), cert. den., 498 U.S. 814 (1990), noted that an extended leave would have been reasonable because its plaintiff had shown in previous episodes of migrane attacks that he was likely to recover in only a few months, and in Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601 (7th Cir. 1998), the employee had requested only a short-term leave and her doctor stated that he believed 2-4 weeks would be enough to get her through her lupus flare-up. Here, after seven months, petitioner's doctors were unable to forecast when or whether his condition might improve; indeed, there was continued discussion of a potential need for major surgery in addition to medication if his condition did not improve; the end of his leave period was nowhere in sight. Jankowski Lee & Assocs v. Cisneros, 91 F.3d 891 (7th Cir. 1996) did not involve a request for a leave but for a parking space, and is completely inapposite in that respect.

There are no conflicting rulings of law for this Court to review any under these facts, and the cases most closely corresponding to the facts here support the result reached by the courts below.

II. There Is No Conflict Among The Circuits Over The Principle That the Employee Must Request A Reasonable Accommodation Before Claiming That One Was Denied.

Petitioner argues that the Circuits are split over whether or not the employee has a duty to request a reasonable accommodation before claiming a failure of such accommodation. He cites cases from the First, Sixth, Seventh, and Ninth Circuits for the proposition that the duty to accommodate attaches as soon as an employer knows that an employee has a disability, and claims that this creates a conflict of legal authorities between those and cases (none cited) from other Circuits which hold differently.

In fact, the cited cases do not state such a hard and fast rule, and also, other more recent cases from those same Circuits actually state the rule that was applied here: that an employer cannot be liable for a failure to provide an accommodation if the employee has not requested or proposed one. Thus, there is no split in the Circuits on that proposition.

See, e.g., Watkins v. J&S Oil Co., 164 F.3d 55, 62 (1st Cir. 1998), which flatly states that "under the ADA, Watkins was obligated to request a reasonable accommodation;" Brown v. Chase Brass & Copper, 2001 U.S. App. LEXIS 15726 (6th Cir. July 10, 2001), citing Monette, supra, which held that the "disabled individual bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable;"[2] Jovanovic v. In-Sink-Erator Division, 201 F.3d 894 (7th Cir. 2000), also points out that "we believe that the standard rule is that a plaintiff must normally request an accommodation before liability under the ADA attaches," citing Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1218 (8th Cir.) cert. denied, 528 U.S. 821 (1999)("Only [the employee] could accurately identify the need for accommodations specific to her job and workplace"); and Brown v. Lucky Stores Inc., 246 F.3d 1182, 1188 (9th Cir. 2001), denying plaintiff's ADA claim specifically because she had not requested any accommodation. These holdings are in line with those in several other Circuits that have considered this issue; e.g., Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir.), cert. den., 519 U.S. 1029 (1996)(ambiguous requests do not meet this standard); Hatchett v. Philander Smith College, 251 F.3d 670 (8th Cir. 2001); Gaston v. Bellingrath Gardens, 167 F.3d 1361 (11th Cir. 1999).

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[2] Plaintiff's Sixth Circuit citation on this point, Cehrs, supra, actually accepts this rule, saying simply that the "employee's initial burden of articulating a reasonable accommodation need not be onerous."

As the Ninth Circuit explained Lucky Stores, supra, there is an exception to that rule only where the employer knows that the disability itself has prevented the employee from making the request. That was the rationale relied on in the Seventh Circuit case cited by petitioner, Bultemeyer v. Forth Wayne Community School, 100 F.3d 1281 (7th Cir. 1996), which involved a mentally-ill custodian who was unable to explain the accommodation he needed, thus triggering the employer's duty to engage in an interactive process of inquiry. Similarly, in petitioner's First Circuit case, Criado, supra, the plaintiff had a "mental impairment" and did not communicate directly with her employer at all, so her doctor's communications should have been regarded as sufficient request for accommodation. In Schmidt v. Safeway Inc., 864 F.Supp. 991 (D.Ore. 1994), the plaintiff had an alcohol problem. Here, of course, petitioner's colitis is not the type of disability that prevents him from articulating a request for accommodation, so this exception to the general rule does not apply.[3]

Petitioner's problem in this case is that, as the District Court found and the Second Circuit affirmed, he failed to present evidence that would raise a genuine factual issue as to whether he actually requested an accommodation that would make it possible for him to return to work and perform the

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[3] Petitioner's other citations do not actually discuss the rule; in Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998), a class action, the plaintiffs had in fact made a request for reassignment and the issue was whether the company's alternative accommodations were sufficient; in Kimbro, supra, the issue was whether the employer could be charged with knowledge possessed by plaintiff's supervisor about the nature and extent of plaintiff's disability.

essential functions of his job.[4] Rather, the evidence tends to show that he simply stayed out on sick leave and even when offered the chance to return to limited desk duty, he rejected it, saying he was not yet ready to return to work.

Whether or not a longer leave would have been an appropriate accommodation, as Mazza now belatedly suggests (and under the circumstances here, where there was no indication how long it would take him to recover, it could not reasonably be required; see (a) above), his failure to submit evidence of any request for such an accommodation while he was still employed justified summary judgment for defendants. The Circuits are united in holding that under the circumstances present here, the employee must propose an appropriate accommodation. On this point, the Second Circuit was correct here, and there is no legal issue dividing the Circuits for this Court to resolve.

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[4] He certainly never asked the Police Department for an accommodation in the form of an extended leave of absence. It is only in his legal papers that he now asserts that the Police Department should have offered him a still-longer sick leave as a form of accommodation, to let him recover enough to perform full duty. Clearly it is not permissible for an employee to refrain from proposing a particular accommodation until after he has been discharged, and then, in his legal papers, to complain that the employer did not offer that choice of appropriate accommodation. Webster v. Methodist Occupational Health Centers Inc., 141 F.3d 1236, 1238 (7th Cir. 1998).

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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